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No. 96-1429

In the Supreme Court of the United States

OCTOBER TERM, 1996

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A Municipal Corporation; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

ERIC M. RUBIN
WALTER E. DIERCKS
Rubin, Winston, Diercks, Harris & Cooke
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 861-0870

ANDREW L. FREY*
KENNETH S. GELLER
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

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PETITIONER'S REPLY BRIEF

A. The Ordinance Cannot Survive Scrutiny Under The First Amendment

Baltimore's opposition to the petition in this case entirely misses the point of the first question presented. Our submission is that a court addressing a First Amendment challenge to a regulation of commercial speech cannot content itself with determining, on the basis of the legislative record, whether the legislature acted rationally in concluding that the restriction would advance the government's aims. Baltimore does not deny that the court of appeals in this case took precisely that deferential approach in determining the constitutionality of the ordinance;[1] the court took no account of the conflicting evidence on the question whether the ordinance would be effective, did not allow for the development of a meaningful record on the point, and made no inquiry into whether the ordinance would "'in fact alleviate [the targeted harms] to a material degree.'" *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995) (citation omitted). The question whether this approach is correct presents a recurring issue of enormous practical importance.

1. In arguing that the ordinance satisfies the third prong of the *Central Hudson* test — which requires the government to show "'not merely that its regulation will advance its interest, but also that it will do so to a material degree'" (*44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495, 1509 (1996), quoting *Edenfield* v. *Fane*, 507 U.S. 761, 771 (1993)) — Baltimore principally relies on what it labels the "common sense link" between advertising and underage smoking. Br. in Opp. 4. The City adds that there is no need for "re-examination of this Court's assumption, as a matter of law, that advertising increases consumption." *Id.* at 5. But this

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[1] The Fourth Circuit stated that it conducted an "independent assessment" of the ordinance, and Baltimore repeats (at Br. in Opp. 3) that statement. We explained in the petition (at 10 n.7), however, that the court of appeals took an "independent" look only at whether the legislature could reasonably have believed that the ordinance would be effective; the court did not itself conduct *any* inquiry into whether the ordinance would be effective, or was narrowly tailored to achieve its goals. Baltimore does not take issue with our characterization of the holding below on this point.

Court *already* has rejected the assumption that a "common sense link" of this sort suffices to justify a restriction on commercial speech, making clear in *44 Liquormart* that a "more searching[]" examination of the speech restriction is necessary. 116 S. Ct. at 1522 (O'Connor, J., concurring in the judgment). See Pet. 12.

The point is proved by the very cases cited by Baltimore at Br. in Opp. 4. Surely the "common sense link" between municipal esthetics and proliferating outdoor newsracks, or between alcohol beverage price advertising and excessive drinking, is at least as powerful as the association between billboard advertising and smoking by minors. Yet the Court invalidated the newsrack restriction challenged in *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410 (1993), and the alcohol beverage advertising regulation at issue in *44 Liquormart*, because the government failed in both cases to make a factual showing that its "common sense" suppositions were in fact well founded, *i.e.*, that the speech bans actually would be effective or were narrowly tailored.

Moreover, Baltimore's assumptions about common sense, even if well founded as a generality, miss the mark in this case because not directed to the specific speech restriction here at issue. There is no basis whatever for Baltimore's assertion (Br. in Opp. 5) that "[t]he studies placed before the court below demonstrate that advertising of the type restricted by Baltimore's ordinance plays a unique and significant role in stimulating illegal consumption of cigarettes by minors." In fact, we explained in the petition — and Baltimore does not deny — that there is *no* evidence *anywhere* (and certainly not in the record here) that *billboard* advertising increases smoking by minors (see Pet. 14); that there is no reason to suppose that the ordinance will produce *any* net reduction in the amount of tobacco advertising to which youths are exposed (the record actually is to the contrary) (see Pet. 15); and that any small reduction in the volume of advertising that did result from the ordinance would have no material effect because tobacco advertising is permitted in many other media (see Pet. 15-16).[2] In

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[2] Baltimore evidently concedes this point, for the City argues elsewhere that the impact of the ordinance on adults will be insignificant "in view of the many alternative channels of communication left unrestricted by the

this setting, the City makes no response at all to the argument in the petition (at 16) that this case is identical to *Discovery Network* and is indistinguishable in principle from *Valley Broadcasting Co.* v. *United States*, 1997 U.S. App. LEXIS 3291 (9th Cir. Feb. 15, 1997).

2. Baltimore's argument under the fourth prong of the *Central Hudson* test, which requires that a commercial speech restriction be narrowly tailored, effectively acknowledges that the holding below is inconsistent with this Court's decisions. The City recognizes that, at a minimum, the availability of alternative, non-speech-restricting means of achieving the government's goal is "relevant" to the fourth prong inquiry. Br. in Opp. 8, 9. But the Fourth Circuit held that such non-speech alternatives are wholly *irrelevant*, refusing even to consider the possibility that educational campaigns or enhanced enforcement of existing prohibitions would be as (or more) effective than a speech ban in discouraging underage smoking. See Pet. App. 13a-14. This is so even though — as we note in the petition (at 18 & n.14) and as Baltimore does not deny — there is compelling evidence that such alternatives *would* be effective.[3]

Baltimore gets no more support from its related argument that the ordinance is justified as an exercise in paternalism that is intended to protect minors. As we argued in the petition (at Pet. 22), while the *purpose* of protecting children surely is a substantial one, simply invoking that purpose does not relieve the government of the obligation to show that its restriction on speech is narrowly

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ordinance." Br. in Opp. 10. In an age when minors have ready access to the Internet (not to mention newspapers, magazines, and the many outdoor signs that are unaffected by the ordinance), Baltimore offers no reason to believe that these "many alternative channels" will not render the ordinance wholly ineffective as to minors as well as to adults. Indeed, if common sense suggests anything, it is that this ordinance will be totally ineffectual in furthering its stated goal.

[3] Of course, these alternatives would do nothing to undermine the economic viability of billboards as a medium of speech, which, we suspect, may be the City's true goal.

tailored and will in fact achieve the state's purpose. Baltimore makes *no* response at all to this point.

The City also is wrong in contending (at Br. in Op. 11-12) that the underinclusiveness of the ordinance is constitutionally irrelevant. Baltimore attempts to distinguish *Discovery Network* — which the City recognizes invalidated a partial newspaper newsrack ban on underinclusivity grounds — by asserting that billboards, unlike the other advertising media that are unaffected by the ordinance, are uniquely "immune from all attempts at parental supervision." Br. in Opp. 11. This *ipse dixit* is wholly insupportable. In fact, there is nothing in the record to show (and no reason to believe) that exposure to signs on buses, taxicabs, sports stadiums, or the outside walls of retail establishments is any more subject to parental supevision than is exposure to billboards.

The City's reliance on *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993), likewise is misplaced. As we noted in the petition (at 13 n.9), the statute at issue in *Edge* was upheld because it "was designed to regulate advertising about an activity that had been deemed illegal in the jurisdiction in which the broadcaster was located." *44 Liquormart*, 116 S. Ct. 1511 (opinion of Stevens, J.). As we also explained, that holding has no application in this case, where the targeted speech concerns activity that has not been "deemed illegal" in Baltimore. Again, the City makes no response at all to this point.

3. Finally, the City is incorrect in contending (Br. in Opp. 12-14) that the ordinance will be preempted by a proposed Food and Drug Administration rule that is scheduled to go into effect on August 28, 1997. See 61 Fed. Reg. 44396 (1996). Even assuming that the regulation were to become effective — which is far from certain since, as the City recognizes (Br. in Opp. 14), the FDA rule is the subject of a pending constitutional challenge — it will not preempt the ordinance. In relevant part, the FDA regulation would ban outdoor cigarette advertising within 1000 feet of schools and playgrounds. 61 Fed. Reg. 44615-44618. But the regulation does not ban, and therefore would not preempt local regulation of, other outdoor cigarette advertising. See 62 Fed. Reg. 7390, 7391 (Feb. 19, 1997) (emphasis added) (local regulations preempted only when they "clearly impose specific requirements * * * that are

manifestly in addition to *analogous* Federal requirements"). Because the ordinance applies to billboards throughout Baltimore, whether or not they are not located within 1000 feet of schools or playgrounds, it will be largely unaffected by the FDA regulation.[4]

The City also asserts more generally (Br. in Opp. 13-14; emphasis in original)) that the importance of this case "pales in significance compared to the sweeping federal regulation of cigarette advertising which has been adopted by the FDA" and that the Court should deny review until it "is faced with a case involving a challenge to advertising restrictions of a *national* scope." But the constitutional issue in this case has little to do with the regulation of tobacco;[5] instead, the case presents a First Amendment question of substantial importance and general applicability. The Fourth Circuit's answer to that question stands as a destructive and confusing precedent that cannot be reconciled

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[4] For the same reson, the Federal Cigarette Labeling and Advertising Act question presented in the petition would survive the FDA rule.

[5] The fact that tobacco advertising is involved is relevant to only two points: whether the second prong of *Central Hudson*, requiring a substantial governmental interest, is satisfied (which is undisputed); and whether the regulation is content based (which we think is indisputable but, if not, makes the case more rather than less worthy of review). Neither of these impairs the value of the case as a medium for decision of the substantial First Amendment issues presented.

with this Court's decisions.[6] Further review therefore is imperative.

B. Federal Law Preempts The Ordinance

The preemption issue presented in the petition plainly involves a recurring matter of great currency and significance, and the City does not contend otherwise. The City also makes no attempt to demonstrate that the Fourth Circuit's holding is reconcilable either with the plain language of the Federal Cigarette Labeling and Advertising Act or with this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). The closest Baltimore comes to a defense of the holding below is its bald assertion that, "since the Baltimore ordinance 'simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated,' the ordinance 'neither imposes a duty nor relieves

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[6] For several reasons, this conclusion is not affected by the decision in *Turner Broadcasting System, Inc.* v. *FCC*, No. 95-992 (March 31, 1997), in which a closely divided Court upheld the constitutionality of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992. *First*, the decision in *Turner Broadcasting*, which addressed a content-neutral regulation that was designed to *increase* the number of speakers, plainly was not intended to set out the standard applicable in challenges to regulations of commercial speech; indeed, neither the 43-page majority opinion nor either of the two concurences cited so much as a single commercial speech decision. *Second*, the Court in *Turner Broadcasting already* had remanded the case for development of a further factual record because "[w]ithout a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence * * * we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions * * * ." *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2472 (1994) (plurality opinion). Yet here, the record is far *less* developed than was the pre-remand record in *Turner Broadcasting*. *Third*, if the recent decision in *Turner Broadcasting* is understood to validate restrictions of commercial speech in the absence of a showing that those restrictions "'will in fact alleviate [the targeted harms] to a material degree'" (*Coors*, 115 S. Ct. at 1592 (citation omitted)), that decision is irreconcilable with all of the Court's recent commercial speech holdings. Indeed, the possibility of confusion on this point emphasizes the importance of further review in this case.

a burden on cigarette advertisers *based on smoking and health*.'" Br. in Opp. 16, quoting Pet. App. 11a (emphasis in original). But the City, like the Fourth Circuit, gives absolutely no justification for this non sequitur. As the court of appeals itself recognized (see Pet. 25-26 & n.19), the ordinance was premised on the perceived connection between smoking and health. And the ordinance is, of course, a requirement "imposed under State law with respect to the advertising and promotion of * * * cigarettes." 15 U.S.C. § 1334(b). It therefore is preempted by the plain terms of the Act.

Baltimore's other contentions also lack substance. The City attempts to distinguish *Vango Media* on the ground that the challenged regulation in that case involved "the *content* of cigarette advertising," while the Baltimore ordinance "does not subject cigarette manufacturers to any restriction concerning the content of their advertising." Br. in Opp. 15 (emphasis in original). As noted in the petition (at 25), however, this distinction is wholly irrelevant because the Act does not differentiate between restrictions directed to the content of cigarette advertising and regulations of any other sort. That point comes clear from *Cipollone*. 505 U.S. at 520, 523 (plurality opinion). Indeed, the distinction urged by the City was addressed and expressly rejected in *Vango Media* itself, where the Second Circuit was unpersuaded by the argument that New York's regulation survived preemption because "it impose[d] no requirements or prohibitions on the content, format or display of cigarette advertisements." 34 F.3d at 73.[7]

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[7] The City therefore is wrong when it contends (at Br. in Opp. 15-16) that the "language and legislative history" of the Act address only laws "that would alter the content or regulate the message of cigarette commercials." The language of the Act is susceptible to no such reading; it preempts any regulation so long as it is "based on smoking and health." 15 U.S.C. § 1334(b). The only legislative history cited by the City, meanwhile, is a snippet from 1965. Br. in Opp. 16 n.3. But amendments added in *1969* significantly broadened the reach of the Act. See *Cipollone*, 505 U.S. at 523 (plurality opinion). Legislative history at that later time made clear that the amended Act "preempts the States from *any* action restricting [cigarette] advertising." 116 Cong. Rec. 6640 (1970) (colloquy of Sen. Magnuson and Sen. Cooper) (emphasis added). See *Vango Media*, 34 F.3d at 74.

Against this background, the decision below disregards the plain terms of the controlling statute and conflicts with a holding of the Second Circuit. It also upsets a delicate and carefully balanced legislative compromise struck by Congress. And it surely will generate confusion in a much litigated and very important area. Further review therefore is in order.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERIC M. RUBIN
WALTER E. DIERCKS
Rubin, Winston, Diercks, Harris & Cooke
1333 New Hampshire Avenue N.W.
Washington, D.C. 20036
(202) 861-0870

ANDREW L. FREY*
KENNETH S. GELLER
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

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